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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KRISTIN OSTERHOUT, Plaintiff and Appellant, v. THE REGAL INN, Defendant and Respondent.	B236197 (Los Angeles County Super. Ct. No. NC054890)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick T. Madden, Judge. Affirmed.

McNamara & Associates, Thomas F. McNamara; McClaugherty & Associates, and Jay S. McClaugherty for Plaintiff and Appellant.

Manning & Kass Ellrod, Ramirez, Trester, Jeffrey M. Lenkov, Sevan Gobel, and Ladell Hulet Muhlestein for Defendant and Respondent.

INTRODUCTION

In this premises liability action, plaintiff Kristin Osterhout appeals from the trial court's grant of summary judgment in favor of defendant The Regal Inn, a bar at which she suffered injuries when a third party assailant knocked her to the ground. Because we conclude that, as a matter of law, Osterhout could not establish the element of causation necessary to prevail in a negligence action, we affirm the judgment in favor of The Regal Inn.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Kristin Osterhout went to The Regal Inn (the Inn), a bar in Lakewood, California, with several friends on August 21, 2009. All of her friends went outside to smoke and after a short time she decided to join them. Unbeknownst to Osterhout, moments before she stepped outside, an unidentified man described only as a large Pacific Islander whom Osterhout contends was in the bar earlier, abruptly and for no apparent reason struck another patron, Abel Magallanes. The assailant then fled on foot and in his flight shoved plaintiff to the ground seconds after she exited the bar, causing her to suffer injuries to her left ankle and foot.

Plaintiff filed a form complaint for premises liability, contending that "[w]hile on the premises of Defendant, the Regal Inn . . . , Plaintiff was the victim of an assault and battery committed by Does 1 - 5, inclusive, an intoxicated customer of [the Inn]. [The Inn] knew or should have known of the dangerous propensities of Does 1 - 5, yet continued to serve him alcohol." The Inn filed an answer, asserting numerous affirmative defenses.

The Motion for Summary Judgment

The Inn filed a motion for summary judgment or, in the alternative, summary adjudication of issues, along with supporting evidence and a separate statement of

undisputed material facts. The Inn asserted the following as undisputed material facts. At the time of the incident and during the evening of the incident, three unarmed security guards were on duty at the Inn: James Sneed, Jennifer Lawler, and Greg Lawler. Their role was to maintain order and "backup" the bartender by interacting with persons of concern. The security guards patrol the interior and exterior of the bar every 15 minutes or so to make sure that no drinking is going on outside because the bar is not licensed for the consumption of alcohol outside the bar.

About three seconds after walking out of the Inn onto the sidewalk that runs in front of the bar, Osterhout stepped into the path of an individual who was running down the sidewalk toward her. Their paths intersected and he knocked into her or pushed her out of the way as he ran past and continued to run down the sidewalk. Osterhout was later told by her friends that the individual had delivered a single, sudden, unprovoked punch to another patron, Abel Magallanes, immediately after which he knocked Osterhout out of the way as he fled. While she was in the bar, Osterhout did not see the individual who later knocked into her and could not identify him except to say he was a very large Pacific Islander, about six feet tall and weighing around 300 pounds. She had seen a group of Pacific Islanders inside the bar earlier, but she did not believe she had seen among them the man who shoved her. She did not notice any of them being rowdy or drinking heavily, and she did not have any cause to be concerned for her safety.

There was no indication inside the Inn during the hour and one-half prior to the incident that an incident was ensuing or might ensue outside. No one inside the Inn was causing trouble, acting in an obstreperous or aggressive manner, or appeared to be overly intoxicated. The Inn did not receive any warnings or complaints about potential danger from an obstreperous patron that evening. There was no evidence the unidentified assailant was known to employees of the Inn, or known by them to have a propensity for fighting. Previously, a male Pacific Islander had been banned from the bar because of a history of causing problems, but he was not there that night and had not been there in months. The Inn has no windows in the front facing the street, so the area of the sidewalk in front of the bar where the incident occurred is not visible from inside the Inn. There

was no evidence that additional security or anything else the Inn could reasonably have done would have prevented the incident. Given the location of the incident and its brevity, even if a security guard had been in the immediate vicinity of the incident, he or she could not have prevented its occurrence.

The Opposition

Osterhout filed opposition with supporting evidence and a separate statement of disputed and undisputed material facts.

In summary, Osterhout disagreed that there was no indication of trouble prior to the incident, and further disagreed that there was no evidence that the assailant was ever inside the Inn. She disputed that the man who attacked her was not known to employees of the Inn. Osterhout asserted that there had been 69 incidents at the Inn in the previous five years that resulted in the Los Angeles County Sheriff's Department being called, including incidents regarding a large male Pacific Islander.

The primary support for Osterhout's contentions came in the form of a declaration by Chris Henderson, who became Osterhout's boyfriend several months after the incident, and a declaration by Greg Lawler, who provided security on the night of the incident. The trial court ultimately excluded the greater part of Henderson's declaration after sustaining the Inn's objections based on lack of foundation, lack of personal knowledge, and speculation (among other objections). The portions that were excluded are set forth in italics below.

Henderson stated in his declaration that he was present at the Inn on the night of Osterhout's injury. He stated: "2. . . . On that night I observed a group of approximately 6 large Samoan males (Pacific Islanders) at [the Inn]. *One of these Samoan males, a large person, was the person who that evening attacked and punched a co-worker friend of mine named Abel Magallanes, a patron of [the Inn].*[1] *This attack occurred on the*

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[1] The spelling of Abel's last name varies between Magallanes and Magallenes. Because we have no means of determining the correct spelling, we simply transcribe it as it appears in the declaration.

walkway just outside the front door of [the Inn], after that large S[a]moan had left [the Inn]. [¶] 3. For approximately 2 years before the . . . incident I was a regular patron of [the Inn]. *. . . During that period I observed the large S[a]moan who attacked Abel Magallanes at [the Inn] on numerous occasions inside [the Inn]. During that 2-year period I observed that large Samoan who attacked Abel Magallenes . . . get involved in at least 10 separate physical altercations with other patrons of [the Inn].* [¶] 4. *On the evening of the . . . incident, in the approximately 10 minutes before the incident I observed what appeared to be friends of the large S[a]moan male who attacked Abel Magallenes, other Samoan males, restrain the large Samoan who later attacked Abel Magallanes. It appeared to me that those other Samoan males were aware that the large Samoan male who attacked Abel Magallenes was about to get involved in another altercation like the ones I had observed in the prior approximately 2 years, and required restraint.*" He continued: "6. *In my experience over the approximately 2 years before the . . . incident observing the behavior of . . . that large Samoan who attacked Abel Magallanes . . . , I never observed any security guard or bartender from [the Inn] make any effort to stop or thwart that large Samoan from getting involved in . . . at least 10 separate physical altercations with other patrons of [the Inn] that I observed.* [¶] 7. . . . [¶] 8. After the large Samoan attacked victim Abel Magallanes . . . , he turned and ran toward the other victim, Kristin Osterhout, shoved her to the ground, causing her to suffer a serious injury to her left ankle and foot. *If there had been a security guard at the door of the Regal Inn when the large Samoan attacked Abel Magallanes, that security guard would have been able to observe the attack upon [Magallanes] and would have been able to intervene and stop the large Samoan from later shoving victim Kristin Osterhout to the ground, causing her injury.*" Finally, Henderson also declared: "10. *In my experience over the approximately 2 years before the . . . incident observing the behavior of that large Samoan who attacked Abel Magallanes on the night of [the incident], I have regularly observed that large Samoan to behave toward other patrons of [the Inn] in an aggressive, confrontational and hostile manner. As noted above, on at least 10 of those*

occasions that large Samoan became involved in physical altercations with other patrons of [the Inn] that observed [sic]."

Osterhout also filed a declaration of Greg Lawler, in which he stated that he was working as a "volunteer security guard" at the Inn on the night of the incident and had worked in that capacity for about four years. In exchange for acting as a security guard, he was given free alcoholic drinks, including on the night of the incident.

Lawler stated that before the incident involving Osterhout, he "observed inside the bar a large Samoan (Pacific Islander) male," who "appeared suspicious, as though he was casing the bar out." He later saw the man "walking directly toward me as I was walking toward him. At that time my wife, Jennifer, was directly behind me and security guard James Sneed was directly behind her. The large Samoan male proceeded directly and aggressively toward me, on a collision course with me, clearly making no effort to step aside to avoid walking into me. He did in fact bump into me. This person then walked away. The manner in which this person walked toward me was confrontational [and] defiant . . . . *I believe that the large Samoan male is the one who later struck a patron just outside the bar that evening in the incident involving Kristin Osterhout.*" The court ultimately excluded the italicized portion of Lawler's declaration based on the Inn's objections of lack of foundation, irrelevance, insufficient probative value, and speculation (because Lawler did not establish he was outside the Inn during the incident or that he personally observed the incident).

The Reply

The Inn filed reply papers, including a reply statement of undisputed material facts, rebuttal evidence, and objections to Osterhout's evidence (mentioned above).

The Hearing and the Ruling on the Motion

On the day of the hearing on the motion for summary judgment, Osterhout filed objections to the Inn's evidence, along with supplemental evidence and a supplemental

separate statement of disputed material facts.[2] She also requested a continuance of the hearing on the motion. The court declined to continue the matter and heard the motion, made evidentiary rulings (including on Osterhout's belatedly filed objections), and took the matter under submission. The Inn filed responses to the supplemental opposition the following day.

The trial court granted the Inn's motion for summary judgment on the ground the Inn "owed no duty to plaintiff to provide additional security outside defendant's premises or to prevent a spontaneous collision with an unidentified individual outside the premises." The court entered judgment in favor of the Inn on August 10, 2011, and notice of entry of judgment was filed and served on August 19, 2011. Osterhout appeals from the judgment.

DISCUSSION

"Our de novo review of summary judgment 'is governed by [Code of Civil Procedure] section 437c, which provides in subdivision (c) that a motion for summary judgment may only be granted when, considering all of the evidence set forth in the papers and all inferences reasonably deducible therefrom, it has been demonstrated that there is no triable issue as to any material fact and the cause of action has no merit. The pleadings govern the issues to be addressed. [Citation.]' (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1331.) A defendant moving for summary judgment must demonstrate that there is no triable issue of fact by 'producing evidence that demonstrates that a cause of action has no merit because one or more of its elements cannot be established to the degree of proof that would be required at trial, or that there is a complete defense to it. Once that has been accomplished, the burden shifts to the plaintiff to show, by producing evidence of specific facts, that a

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[2] The supplemental evidence consisted of Los Angeles County Sheriff's incident reports pertaining to the Inn, and the lease and lease extension pertaining to the premises (offered as evidence regarding the Inn's responsibilities as to the sidewalk).

triable issue of material fact exists as to the cause of action or the defense. (*Aguilar* [*v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826,] 849-851, 854-855.)' (*Ibid.*)" (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1465.) In conducting our independent review, we view the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).)

An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff. (See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) Here, the trial court granted summary judgment on the basis that Osterhout could not establish that the Inn owed her a legal duty.

"'[I]t is axiomatic that we review the trial court's rulings and not its reasoning.' (*People v. Mason* (1991) 52 Cal.3d 909, 944.) Thus, a reviewing court may affirm a trial court's decision granting summary judgment for an erroneous reason. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.)" (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336.) In this case we do not find it necessary to consider whether the trial court's reasoning was erroneous when it ruled that the Inn did not owe a duty to provide additional security outside its premises or prevent a spontaneous collision. Rather, we conclude that summary judgment in favor of the Inn was warranted on another ground we find to be clear-cut and dispositive, i.e., the absence of actual causation. Causation may be resolved as a matter of law where the evidence permits only one conclusion. (*Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 428.)

As to the substance of the court's ruling, Osterhout argues that the Inn had a duty to protect her from intentional and criminal acts of other bar patrons by taking "reasonable preventive measures." According to Osterhout, this action "is a case of a known troublemaker at The Regal Inn becoming aggressive and confrontational while at the bar . . . , punching a patron . . . while on bar premises, and while fleeing the scene taking a swipe at another patron, namely Osterhout." Osterhout contends there is a triable issue of causation, because "if there had been a security guard stationed at the door

of the Regal Inn when the large Samoan attacked Abel Magallanes, that security guard would have been able to observe the attack upon [Magallanes] and would have been able to intervene and stop the large Samoan from later injuring [plaintiff]." This latter point of causation is supported by the declaration of Henderson, Osterhout's boyfriend who was present at the bar (though it is disputed whether he saw the assailant punch Magallanes or knock down Osterhout), in which he asserts his belief that a security guard at the door would have been able to stop the assailant from injuring Osterhout. As previously noted, the trial court sustained objections to the entire substance of Henderson's declaration, including his assertion regarding causation.

The Inn asserts Osterhout cannot establish causation because there is no evidence that if the Inn had provided an additional guard posted at the location suggested by Osterhout, the guard would have prevented the assailant from throwing a punch, running down the sidewalk, or colliding with Osterhout. We agree.

Even assuming that the Inn owed a duty to use reasonable preventative measures to protect patrons on the sidewalk outside the bar from criminal acts of other bar patrons, and even assuming that the Pacific Islander who purportedly was aggressive inside the bar is the same one who injured Osterhout, there is no triable issue of causation on these facts.

"In *Saelzler v. Advanced Group 400, supra,* 25 Cal.4th 763, . . . the plaintiff, who was criminally assaulted while attempting to deliver a package at the defendant's apartment complex, alleged that better security measures would have prevented the assault. The court observed that proof of causation cannot be based upon speculation and conjecture, and that a mere possibility of causation is insufficient. (*Id.* at pp. 775-776.) To establish causation, the plaintiff must demonstrate some substantial link or nexus between omission and injury. (*Id.* at p. 778.) The plaintiff must show it was more probable than not that different security precautions would have prevented the attack. (*Id.* at p. 776.) In the absence of actual proof of causation, an expert's opinion that better security measures would have prevented the assault is nothing more than speculation and conjecture and is insufficient. (*Id.* at p. 777.) The court went on to reject the plaintiff's

argument for a 'common sense' or 'practical approach' that would permit cause to be inferred from the hindsight observation that the injury occurred. (*Id.* at p. 778.) The court also rejected the suggestion that the burden of proof on the causation issue should be shifted to the defendant. (*Id.* at p. 780.) It is the plaintiff's burden to establish causation by competent evidence. (*Ibid.*)" (*Thompson v. Sacramento City Unified School Dist*. (2003) 107 Cal.App.4th 1352, 1371.)

Here, regardless of any other rulings the trial court made regarding Henderson's declaration, it properly excluded the opinion testimony of Henderson that a security guard at the door would have seen the attack on Magallanes and been able to intervene in such a way as to prevent the assailant from fleeing and running into Osterhout. Osterhout argues that this testimony is permissible lay opinion. It is not, because it is not "[r]ationally based on the perception of the witness" or "[h]elpful to a clear understanding of his testimony." (Evid. Code, § 800, subds. (a) & (b).) Assuming that Henderson witnessed relevant events, he is competent to report his observations of those events. But his opinion that a security guard could have prevented Osterhout's harm is not necessary to understand those observations, and is not rationally based on those observations—it is entirely speculative. It is merely the expression of inadmissible "conjectural lay opinion" that is unhelpful to the trier of fact. (*People v. Thornton* (2007) 41 Cal.4th 391, 429.)

Second, even if Henderson's lay opinion were admissible, it would still be insufficient to raise a triable issue on causation, just as expert opinion in similar cases has been found insufficient. (See, e.g., *Saelzler, supra*, 25 Cal.4th at p. 777; see also *Rinehart v. Boys & Girls Club of Chula Vista* (2005) 133 Cal.App.4th 419, 433 ["'[W]hile expert criticism of the defendant's security measures may establish abstract negligence, an expert's speculative and conjectural conclusion that different measures might have prevented an injury cannot be relied upon to establish causation.'"].) There is no factual basis on which to show it is more probable than not that a security guard at the door could have intervened in such a way as to prevent the assault on Magallanes, or, more importantly, would have prevented the flight of the assailant and the collision with

Osterhout. Evidence to support actual causation in this case is entirely lacking, given that the rapidity of the assault on Magallanes and of the subsequent flight by the assailant made it highly improbable that Osterhout's injury could have been prevented by a guard at the door. Even assuming a guard at the door would have had a duty to intervene, such a guard's first obligation on witnessing the assault would not have been to apprehend the assailant but to render aid to Magallanes, making the restraining of the assailant before he ran into Osterhout even more remote a possibility. Thus, there is no triable issue on causation.

A business owner is not an insurer of the safety of persons on the property. Its duty "'does not extend to controlling the misconduct of third persons which [it] has no reason to anticipate and *no reasonable opportunity or means to prevent*.'" (*Southland Corp. v. Superior Court* (1988) 203 Cal.App.3d 656, 668, italics added.) Even assuming for the sake of discussion that Henderson's declaration adequately established that he witnessed the incident involving Osterhout and that he could identify the assailant as being the same person he saw inside the bar bump shoulders with Lawler, the Inn had no reason to anticipate based on such behavior that he would go outside, randomly punch somebody, and then bowl over a bystander as he fled. His bumping into Lawler did not constitute reason for the Inn to escort him out before he caused harm. Furthermore, Henderson did not state that the Inn had notice that the individual at issue had supposedly engaged in physical altercations in the past. The facts here are in stark contrast, for example, to those in *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 240. There, a bar's security guard noticed hostilities mounting between plaintiff and another group of customers and decided to separate them by asking plaintiff to leave. The guard did nothing when the other customers followed plaintiff outside, where they attacked and beat him. The Supreme Court found that because defendant had actual notice of an impending assault involving a bar patron, its duty included an obligation to take reasonable, relatively simple, and minimally burdensome steps to attempt to avert that danger. (*Id.* at p. 250.)

Here the threat to Osterhout's safety did not materialize until she stepped outside the bar. The entire incident consisted of a single, unprovoked punch, followed by the assailant knocking Osterhout to the ground as he fled and she happened to step out of the bar and into his path. A mere possibility that a security guard posted at the door to the Inn would have prevented Osterhout's injury is not enough to establish actual causation. Where there is only a speculative possibility that additional security guards or other security measures might have prevented the assault, Osterhout cannot establish that the Inn's omissions caused her injuries. We therefore conclude that summary judgment was properly granted.

DISPOSITION

Judgment in favor of the Inn is affirmed. Costs on appeal are awarded to respondent.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.